SUPREME COURT, U. S.

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Misc. No. 376

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

GEORGE K. FISHER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

Opinion Below 2

Statement of Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 4

Reasons Relied Upon for Allowance of the Writ 6

Appendix A—Order of the United States District Court for the Middle District of Tennessee, Nashville Division A1

Appendix B—Opinion of the United States Court of Appeals for the Sixth Circuit A3

Table of Authorities

CASES

Berger v. *United States*, 55 S. Ct. 633 8

Pharr v. *United States*, 48 F. 2d 767 (C. A. 6) 9

Volkmor v. *United States*, 13 F. 2d 594 9

STATUTES

Title 18, U. S. C., §§1341, 1342 4

Title 18, U. S. C. A., §1342 3

Title 28, U. S. C. A., §1254(1) 2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, George K. Fisher, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in Case No. 17,222 of that court, on May 2, 1967.

OPINION BELOW

The District Court entered an order overruling the petitioner's motion for a new trial. This order, entered on March 7, 1966, has not been generally reported. A copy of the order of the District Court overruling the motion for a new trial is appended hereto as Appendix A.

The District Court entered judgment sentencing the petitioner to one year under counts one and three of the indictment, said sentences to run consecutively, and one year under counts four, five and seven, and these sentences to run concurrently with each other and concurrently with sentences imposed under counts one and three.

The Opinion of the Court of Appeals is appended hereto as Appendix B.

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on May 2, 1967. An order extending the time to file petition for writ of certiorari was entered on the 26th day of May, 1967, granting petitioner additional time to and including June 30, 1967.

The jurisdiction to review the judgment is conferred on this Court by Title 28, U. S. C. A., §1254(1).

QUESTIONS PRESENTED

1. Was the petitioner prejudiced, and should the District Court have declared a mistrial because of the United States Attorney's questions and remarks relating to narcotics?

STATUTES INVOLVED

Frauds and swindles—Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligations, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Fictitious name or address—Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18, U. S. C. A., §1342.

STATEMENT OF THE CASE

The petitioner was charged in seven counts of a nine-count indictment, alleging violations of the provisions of Title 18, U. S. C., §§1341 and 1342. The first count alleged that from about the 26th day of March, 1964, continuing to or on about the 20th day of April, 1964, the petitioner and one Thomas Leroy Sircy, used the fictitious, false, and assumed name "James R. Watson" for the purpose of conducting and carrying on by means of the Post Office Department of the United States, a scheme and device to defraud numerous individuals, to-wit: That these defendants, along with another defendant, Arville Knight, devised and intended to devise a scheme to obtain money by fraudulent pretenses, representations, and promises, from six named individuals and others whose names were to the Grand Jury unknown. It was further alleged in count three of the indictment, which was incorporated in count one by reference, that said defendants would write letters to persons who were owners or collectors of valuable coins, offering to exchange specifically identified valuable coins, allegedly in the possession of "James R. Watson" for specifically rare or valuable coins in the possessio of the addressees of said letters. That it was further a part of said scheme that these defendants intended to receive such valuable coins from the addressees of said letters, but did not intend to complete the proposed exchanges by mailing valuable coins to the said addressees, as promised.

Counts three, four, five, six, seven and eight alleged specific deposits of mail matter at different times to different persons, for the purpose of carrying out the alleged scheme, with the intent to defraud. These specific counts, that is, three through eight, alleged a violation of 18 U. S. C. 1341 and 2(b).

Counts six and eight of the indictment were dismissed on motion of the government at the conclusion of its proof. The appellant was found guilty by the jury on counts one, three, four, five and seven. The court imposed a sentence of one year under each of counts one and three with the provision that these sentences run consecutively; and one year under counts four, five and seven, with the provision that these sentences run concurrently with each other and concurrently with sentences in counts one and three.

The petitioner moved the court for a judgment of acquittal at the conclusion of the government's proof, which motion was renewed at the conclusion of all the proof. These motions were overruled by the court.

The defendant also moved the court for a mistrial, based upon the questions of the United States Attorney implying that the petitioner was a user of narcotics.

The defendant thereafter filed a motion for a new trial in which he alleged:

Comes the defendant, George K. Fisher, and moves the Court to set aside the verdict of the Court and jury and grant him a new trial upon the following grounds:

1. The evidence preponderated in favor of the innocence of the defendant.

2. No intent was shown on the part of the defendant, George K. Fisher, to violate the law, and such actions as he may have taken were to accommodate a co-defendant who was subsequently dismissed.

3. The inflammatory questions directed toward the witness, Thomas Sircy, concerning narcotics were of such a nature as to inflame the jury against the defendant,

George K. Fisher, when the United States Attorney knew at the time he could not connect these remarks with any proof to be offered subsequently.

4. The Government's proof did not include any act or accusation on the part of any witness that the defendant, George K. Fisher, ever placed in the United States mails any of the letters which were the subject of this controversy, or ever received any of the letters which were the subject of this controversy, nor was it ever proven that he ever knowingly entered into any scheme or device to defraud.

The United States Court of Appeals for the Sixth Circuit entered an order on May 2, 1967, in which the judgment of the District Court, and the order overruling the motion for a new trial in that court was affirmed.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Was the petitioner prejudiced, and should the District Court have declared a mistrial because of the United States Attorney's questions and remarks relating to narcotics?

Petitioner respectfully insists that the inflammatory questions propounded by the Assistant United States Attorney in his re-cross-examination was so prejudicial to the petitioner that his conviction should not be allowed to stand. During the course of the trial in the re-cross-examination by the Assistant United States Attorney of the witness Sircy, the following occurred:

> Q. Who did you sell narcotics to?
>
> A. Well, I'm not on trial for any of my past deeds. Your Honor, would it be necessary for me to answer that question?

THE COURT: I don't think so. Not unless you can show that it is pertinent.

MR. WILSON: I will instruct him to answer, if Your Honor please, but it would be very embarrassing, I think, if he did.

MR. SHRIVER: Do you know whether Mr. Fisher is an addict or not?

A. No, I do not.

Q. You don't know?

A. No.

Q. Do you suspect he is?

A. No, I never had any reason to suspect it.

MR. WILSON: We object to that suspicions.

THE COURT: Sustained.

The appellant respectfully contends that the public generally, and especially jurors, have a right to expect Assistant United States Attorneys to perform their duties fairly. It certainly cannot be said that the irrelevant interrogation as to whether or not this witness knew about the petitioner's use of narcotics was calculated to do anything less than prejudice the petitioner. This witness Sircy, was testifying that the petitioner had been used as an innocent tool of the witness. Of course, the innocent tool theory of the petitioner would be severely damaged and weakened by the question and innuendo that Fisher was a narcotic addict, as was the witness Sircy. In other words, if the witness and the defendant could be associated by implication as both being narcotics addicts, or that Fisher was probably a customer for narcotics of the witness, they were also associated for the purpose of intending to use the mails to defraud. Simply, the petitioner says that this was a prejudicial attempt on the part of the United States Attorney to imply complicity on the part of the petitioner in the commission of other innocuous criminal activity with

the witness which was calculated to destroy the petitioner's theory that he was an innocent agent of the witness.

The petitioner's contention of deliberate impropriety on the part of the United States Attorney is corroborated by the statement of the court that it had "expressed itself several times in the past as taking a very dim view of questions on cross-examination implying things when there is no proof to back it up, such as the questions of this last witness about selling narcotics to Fisher.

"I don't think the question should have been asked—if the government was not prepared to offer some proof in the event of denial.

"I think it is extremely improper and I have told the United States Attorney and I have told defense counsel about that on numerous occasions. I don't like it."

In view of these comments by the court, it certainly cannot be said that this conduct on the part of this Assistant United States Attorney, was the result of inexperience.

The petitioner further contends that he at least was entitled at the time to have had the court instruct the jury to disregard these questions entirely, and this should have been done by the court without any specific requests from counsel for petitioner.

> "It is fair to say that the average jury, in a greater or less degree, has confidence that the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. * * *"
>
> *Berger* v. *United States,* 55 S. Ct. 633.

We insist that even if there had been no objection, it was the duty of the court, on its own motion, to reprove counsel and to instruct the jury to disregard the questions.

See *Volkmor* v. *United States,* 13 F. 2d 594.

Sometimes a single misstep on the part of the prosecutor may be so distructive of the right of a defendant to a fair trial that reversal must follow, as in *Pharr* v. *United States,* 48 F. 2d 767 (C. A. 6).

The petitioner respectfully urges the court to notice that the jury trying this case had first reported that it was hopelessly deadlocked. The only possible basis for this indecision is that at least some of the jurors had a reasonable doubt as to the guilt of the petitioner. This had to be based solely on the explanation and the testimony of the witness Sircy. The government made out a plausible case. The petitioner offered an equally plausible explanation. We do not think that it can be reasonably argued that the questions about narcotics were not prejudicial, and we respectfully contend that it is quite probable that all the jurors were influenced by it.

The Court of Appeals in its Opinion, stated "unless the government was prepared to substantiate its suggestion concerning defendant's addiction, and to show that the matter fell within an exception to the general rule of inadmissibility, the inquiry was highly objectionable." That court seemingly undertook to excuse this prejudicial impropriety because "there is some indication in the record that the trial judge, although initially critical of the questioning, later became satisfied that there was a factual basis for the inquiry and that the issue of addiction may have been admissible."

The petitioner did not testify in his own behalf. This testimony could not have been offered for the purpose of impeachment. Likewise, evidence of narcotics addiction, counsel for petitioner fails to see how innuendo of narcotics addiction could be admissible to prove design, intent or motive, relating to a charge of using the mails to defraud. How would such evidence have been admissible even if the trial judge did conclude that some "indication" in the record that the defendant on trial was addicted to narcotics?

The Court of Appeals further justified its decision by commenting "defense counsel neither objected to the questioning nor moved for a mistrial at the time the questions were asked, and indeed stated that he would instruct the witness to answer." It is true that defense counsel stated "I will instruct him to answer, if Your Honor please, but it would be very embarrassing, I think, if he did." This comment came after the witness had asked the Court: "Would it be necessary for me to answer that question?" Tr. p. 134, lines 17-18.

Whatever may have been the reason for this comment by defense counsel, we insist that his client was being severely damaged by it and that formal objections from the defendant's attorney could not have separated the ink from the water.

However, we respectfully insist that a timely objection and a motion for a mistrial were made by defense counsel. The questions about the narcotics appear on page 134 of the transcript of the trial. On page 137 of the transcript defense counsel stated: "I would like, of course, to enter my—I believe that I did object to the questions of the Attorney General in regard to addiction of my client to narcotics with no proof in the record.

"I again renew my objection to that and I actually believe that it has been so prejudicial that I would move the Court for a mistrial."

Tr. p. 137, lines 11-17.

The objection and the motion for a mistrial are made immediately after the jury had been excused from the courtroom. We insist that it is not unreasonable to assume that defense counsel found himself in a position of having had his client damaged by the prejudicial interrogation, and he feared that an objection in the presence of the jury would only emphasize the jurors' impression of this improper conduct on the part of the United States Attorney.

For the foregoing reasons the petitioner respectfully submits that the writ of certiorari should be granted in this case.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

(Received for Entry United States District Court for the Middle District of Tennessee, Nashville Division, March 14, 1966)

UNITED STATES OF AMERICA
vs.
GEORGE K. FISHER
ARVILLE KNIGHT

} Criminal No. 13,686

This case was called March 7, 1966, for hearing of the motions for new trial heretofore filed by the above-named defendants. The defendants, George K. Fisher and Arville Knight, appeared in person, and by their attorney, William C. Wilson. The Government appeared by Larimore Burton, Jr., Assistant United States Attorney.

Based upon the argument of counsel and upon consideration of the motions for new trial, the Court was of the opinion that said motions were not well taken;

Accordingly, it is ORDERED that motions by the defendants herein for a new trial be, and the same are hereby overruled.

Thereafter, the defendants, and each of them, by their attorney Dale Quillen, orally moved the Court for probation in this case.

Upon consideration of the motions for probation and the statements made by the defendants' counsel, Dale Quillen, in this regard, the Court was of the opinion that said motions were not well taken;

It is further ORDERED that the motions for probation as to each of the named defendants herein, be and the same are hereby overruled.

Thereafter, the defendant George K. Fisher stated to the Court, by his attorney, that he desired to file a notice of appeal in this case.

It is ORDERED that the execution of the sentence heretofore imposed by this Court as to the defendant George K. Fisher be further suspended pending the time allowed by the Criminal Rules for the filing of a notice of appeal and if filed will be further suspended pending the disposition of the said appeal.

It is further ORDERED that the said defendant George K. Fisher remain on his present bond pending the time for filing of notice of appeal and if filed will remain on his present bond until disposition of the appeal.

Thereafter, the defendant Arville Knight stated to the Court, by his attorney, that he did not desire to appeal his conviction and sentence in this case, and further requested the Court for additional time before he is required to report to begin the service of his sentence.

It is further ORDERED that the execution of the sentence heretofore imposed as to the defendant Arville Knight be further suspended until April 11, 1966, at 9:00 A.M., at which time he will report to the United States Marshal at Nashville, Tennessee, to begin service of his sentence.

It is further ORDERED that the said defendant Arville Knight remain on his present bond until the date of April 11, 1966.

Enter:

/s/ Frank Gray Jr.
United States District Judge

APPROVED FOR ENTRY:

/s/ Lawrence Buford Jr.
Assistant U. S. Attorney

APPENDIX B

No. 17222

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

(Filed in the United States District Court May 2, 1967)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GEORGE K. FISHER,
Defendant-Appellant.

APPEAL from the United States District Court for the Middle District of Tennessee.

Decided May 2, 1967.

Before: Edwards and McCree, Circuit Judges, and Cecil, Senior Circuit Judge.

Per Curiam. Defendant appeals from a conviction for the offense of using the mails to defraud in violation of 18 U. S. C. §§ 2(b), 1341-1342. His appeal is grounded on the contentions that the conviction was against the weight of the evidence and that the trial judge should have declared a mistrial because the government attorney improperly questioned defendant's witness concerning the use of narcotics by defendant.

With regard to the first contention, we find that the conviction is adequately supported by the evidence.